BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ESTHER HOLGUIN	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 1,045,300
PAYLESS SHOESOURCE, INC.	)	& 1,045,301
Respondent	)	
AND	)	
	)	
AMERICAN ZURICH INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the April 21, 2010 Award entered by Administrative Law Judge (ALJ) Brad E. Avery. The Workers Compensation Board heard oral argument on July 7, 2010.

APPEARANCES

George H. Pearson, III, of Topeka, Kansas, appeared for claimant. James C. Wright of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

In the April 21, 2010 Award, ALJ Avery granted claimant permanent disability benefits for a 61 percent work disability.[1] The ALJ determined claimant had a 100 percent wage loss and a 22 percent task loss. With regard to the issue of task loss, the ALJ stated:

[1] A permanent partial general disability under K.S.A. 44-510e that is greater than the whole person functional impairment rating.

> It is unreasonable to conclude the Kansas Legislature intended to foreclose an award based upon task loss because the claimant could still, to some degree, perform the task but in a doctor's opinion should be foreclosed from doing so because of the likelihood of continual pain or reinjury. If a doctor states the claimant should not perform a task for the reasons stated, and his or her opinion is adopted, this Court finds it is well within the intent of K.S.A. 44-510e to include such as a part of the calculation of task loss. If the legislature had intended to limit task loss to the scheme advocated by the respondent, it would have not included the phrase "in the opinion of the physician" as the determinative factor in arriving at a task loss.[2]

Respondent contends claimant's functional impairment is 5 percent as opined by Dr. Donald T. Mead. Further, respondent contends claimant did not establish any task loss, her wage loss is 100 percent, and the work disability established by claimant is 50 percent. With regard to the issue of task loss, respondent asserts claimant has established she has not lost the ability to perform any task. Respondent argues the medical testimony does not establish the loss of ability to perform tasks, only that performing them might cause problems in the future.

With regard to task loss, claimant asserts the sole issue on appeal is what the word "ability" means in K.S.A. 44-510e(a). Claimant argues that if a worker has physician-imposed work restrictions limiting activities in order to limit pain and avoid probable reinjury, that removes the ability to perform a task that is beyond the restrictions. Further, claimant argues "strength" and "ability" are not synonymous and points to the Kansas legislature using the latter word in K.S.A. 44-510e(a). Claimant requests the Board affirm the April 21, 2010 Award.

The issues before the Board on this appeal are:

- What is the nature and extent of claimant's impairment?
- Did claimant prove she lost the ability to perform certain work tasks she had performed over the 15-year period before her work-related accident?

The parties agreed that for purposes of writing the award, there is one accident date, December 4, 2008, and one average weekly wage.[3] Thus, the two dockets, Docket Nos. 1,045,300 and 1,045,301, are combined for a single award.

---

[2] ALJ Award (Apr. 21, 2010) at 4.

[3] R.H. Trans. at 4. Claimant's average weekly wage was $523 until March 28, 2009, when it became $548.05. R.H. Trans. at 5.

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant injured her back on December 4, 2008, while trying to move a box that was stuck.[4] The pain claimant experienced, although more intense, was in the same general vicinity as the pain she experienced on March 13, 2008.[5] Claimant received conservative care and limited duty restrictions from Dr. Donald T. Mead after the December 4, 2008 accident. Claimant continued on light duty until February 28, 2009,[6] at which time claimant lost her job when the facility where she worked ceased operation.[7] Dr. Mead released claimant from his care on or about April 28, 2009, and provided a 5 percent whole person impairment rating pursuant to the AMA *Guides*.[8] Dr. Mead also imposed permanent work restrictions upon the claimant based upon a functional capacity evaluation he requested.[9] The restrictions include lifting restrictions: (1) waist to floor, 30 pounds rarely, 25 pounds occasionally, never frequently; (2) waist to crown, 25 pounds rarely, 20 pounds occasionally, 15 pounds frequently; and (3) front carry, 30 pounds rarely, 25 pounds occasionally, 20 pounds frequently. In addition, the doctor allowed occasional elevated work, occasional forward bending and standing and occasional repetitive squat.[10]

Claimant testified at the January 2010 regular hearing that she has not worked anywhere since her job at respondent ended and that she was receiving unemployment compensation.[11] She is able to drive a car and do housework.[12] Claimant also testified that she has raked and planted flowers since seeing Dr. Mead.

---

[4] R.H. Trans. at 7, 8.

[5] *Id.*, at 8. March 13, 2008, is the date of the accident that was claimed in Docket No. 1,045,300.

[6] R.H. Trans. at 6.

[7] *Id.*, at 10.

[8] Mead Depo., Ex. 2 at 3. The AMA *Guides* refers to the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[9] Mead Depo. at 10.

[10] *Id.*, at 11.

[11] R.H. Trans. at 10, 30.

[12] *Id.*, at 26.

Dick Santner, a vocational expert, evaluated claimant on May 14, 2009. From that evaluation, he identified 18 job tasks that the claimant had performed in the 15-year period prior to her December 4, 2008 accident.

Dr. Mead reviewed the task list and ultimately opined that the claimant should not perform 4 of the 18 job tasks (or 22 percent) identified by Mr. Santner.[13] Dr. Mead reached his task loss opinion based upon his belief that performance of the tasks he was limiting claimant from performing would increase pain symptoms and/or place claimant at greater risk of reinjury.[14]

Dr. Edward J. Prostic examined the claimant in May 2009 at the request of her attorney. Dr. Prostic rated claimant's whole body functional impairment at 6 percent pursuant to the AMA *Guides*. Dr. Prostic also found claimant should not perform 4 of the 18 job tasks identified by Mr. Santner.[15] Dr. Prostic imposed lifting restrictions of 30 pounds occasionally with 10 to 15 pounds frequently and avoidance of frequent bending or twisting at the waist.[16] Dr. Prostic explained that the 4 tasks he opined claimant could not perform were based on the fact that the tasks would be too taxing to claimant's thoracic spine and were beyond the work restrictions he imposed.[17]

PRINCIPLES OF LAW

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510(e) states in part:

---

[13] Mead Depo., Ex. 3.

[14] *Id.*, at 20, 21.

[15] Prostic Depo., Ex. 3.

[16] *Id.*, at 22.

[17] *Id.*, at 12.

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

ANALYSIS

K.S.A. 44-510e(a) defines task loss as "the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident . . . ." As the Board stated in *Gustin*,[18] it has been generally accepted in workers compensation that the loss of ability means the claimant is unable to perform the task within the restrictions recommended by a physician because of the injury.[19] Work disability (wage and task loss) is intended, in part, to replace wages.[20] It is unlikely that an employer would knowingly hire a worker to perform a job with required tasks that exceed a worker's restrictions.[21] Respondent argues restrictions that are intended to merely avoid pain and discomfort and the possibility of future injury or re-injury should be disregarded because these are only possible consequences and are not synonymous with ability. Respondent would have the Board adopt a more narrow definition

---

[18] *Gustin v. Payless Shoesource, Inc.*, No. 1,045,442, 2010 WL 3093222 (Kan. WCAB July 27, 2010).

[19] See, *e.g.*, *Gutierrez v. Dold Foods, Inc.*, 40 Kan. App. 2d 1135, 199 P.3d 798 (2009); *Stephen v. Phillips County*, 38 Kan. App. 2d 988, 174 P.3d 452, *rev. denied* 286 Kan. __ (2008); *Edwards v. Boeing Co.*, 37 Kan. App. 2d 469, 154 P.3d 532, *rev. denied* 284 Kan. __ (2007); *Roskilly v. Boeing Co.*, 34 Kan. App. 2d 196, 116 P.3d 38 (2005); *Sharp v. Custom Campers, Inc.*, 31 Kan. App. 2d 772, 74 P.3d 42 (2003); *Haywood v. Cessna Aircraft Co.*, 31 Kan. App. 2d 934, 79 P.3d 179 (2002); *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App. 2d 278, 28 P.3d 398 (2001); *Surls v. Saginaw Quarries, Inc.*, 27 Kan. App. 2d 90, 998 P.2d 514 (2000); *Bohanan v. U.S.D. No. 260*, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

[20] *Blythe v. State Highway Comm.*, 148 Kan. 598, 601, 83 P.2d 678 (1938); *Stephen v. Phillips County*, 38 Kan. App. 2d at 990.

[21] See *Ramirez v. Excel Corp.*, 26 Kan. App. 2d 139, 979 P.2d 1261, *rev. denied* 267 Kan. 886 (1999).

and hold that ability should be defined to only exclude those tasks which a claimant can no longer physically perform due to the injury, irrespective of any physician's restrictions and regardless of the consequences. Unlike K.S.A. 44-510d, the scheduled injury statute, K.S.A. 44-510e provides a method of compensation for loss of income and loss of ability to earn wages (work disability), with the percentage of functional impairment being the floor or minimum when the wage loss does not exceed 10 percent of the preinjury average weekly wage. Although it is interpreting a prior version of K.S.A. 44-510e, *McLaughlin*[22] is instructive as to the difference between functional impairment and work disability.

> "Functional disability is the loss of a part of the total physiological capabilities of the human body." *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 195, 558 P.2d 146 (1976). Work disability, on the other hand, is "that portion of the job requirements that a workman is unable to perform by reason of an injury." 221 Kan. at 195.[23]

Similarly, in *Hanson*,[24] the Court of Appeals makes a clear distinction between impairment and disability. "Once the claimant shows increased disability, compensation is for the full amount of disability less any amount of preexisting impairment established by the respondent."[25]

The Board, in keeping with established precedent and the plain meaning of the statute, finds that a claimant loses the ability to perform a work task when a credible physician opines that the work task cannot be performed within the restrictions imposed for the work-related injury.

In the opinion of Dr. Prostic and Dr. Mead, claimant has lost the ability to perform 4 out of the 18 tasks she performed in her 15 years of working before this accident. This equates to a 22 percent task loss. The ALJ considered both opinions, found them both to be credible, and adopted the two opinions as claimant's task loss. The Board agrees and affirms the ALJ's finding of a 22 percent task loss.

This Board also finds the impairment of function opinions of Drs. Mead and Prostic are equally credible, and the Board will average the two to find claimant's functional impairment is 5.5 percent.

---

[22] *McLaughlin v. Excel Corp.*, 14 Kan. App. 2d 44, 783 P.2d 348, *rev. denied* 245 Kan. 784 (1989).

[23] *Id.* at 46.

[24] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001).

[25] *Id.* at 96.

CONCLUSION

Claimant has met her burden of proving she suffered a loss of ability to perform 22 percent of the work tasks she performed during the relevant 15-year period before her accident. When averaged with her wage loss of 100 percent, claimant's permanent partial disability is 61 percent. Claimant's permanent impairment of function is 5.5 percent.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[26] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that Administrative Law Judge Brad E. Avery's Award dated April 21, 2010, is modified to find claimant sustained a 5.5 percent impairment of function but is otherwise affirmed.[27]

IT IS SO ORDERED.

Dated this ____ day of August, 2010.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: George H. Pearson, III, Attorney for Claimant
James C. Wright, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge

[26] K.S.A. 2009 Supp. 44-555c(k).

[27] This modification does not change the award calculation.